



**FOIA Request**  
**Ellen Steen** to: FOIA HQ  
Cc: danielleg

08/13/2013 02:38 PM

Please see the attached Freedom of Information Act request.

Thank you.

Ellen Steen  
General Counsel & Secretary  
American Farm Bureau Federation® and Affiliates  
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2013.08.13 AFBF FOIA Request. Fee Waviers.pdf



**AMERICAN FARM BUREAU FEDERATION\***

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***By First Class Mail & Electronic Mail***

August 13, 2013

Records, FOIA and Privacy Branch  
Office of Environmental Information  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

**Re: Freedom of Information Act Request**

Dear FOI Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and FOIA regulations at 40 C.F.R. § 2, the American Farm Bureau Federation ("AFBF") requests information from the United States Environmental Protection Agency ("EPA") relating to FOIA fee waiver requests submitted to the Agency. Specifically, AFBF hereby requests copies of (1) all FOIA fee waiver requests (and their associated FOIA requests, if separate documents) received by EPA in the past twelve months, as well as (2) EPA's responses granting, denying or requesting further information pertaining to those fee waiver requests.

FOIA is intended to ensure public access to government records and it establishes a presumption that all agency records be publicly accessible unless specifically exempted from disclosure. AFBF is committed to ensuring that farmers and ranchers and the general public are informed about how government implements its own regulations and policies, including those by EPA that are the subject of this request. The basis by which EPA determines who must pay for access to public information, and who benefits from a fee waiver, is important to the public confidence in how EPA makes these determinations and in making decisions about whether and how to seek government records from EPA. We appreciate EPA's assistance in providing access to the Agency's public records pursuant to this FOIA request.

***FOIA Response***

We believe that the records requested herein, relating to FOIA fee waiver requests and how EPA responds to those requests, are not exempt from disclosure. If EPA should deny access to any records covered by this request, however, please describe in detail each of those records and specify the statutory basis claimed for denial as well as any reasons for asserting that claim. As you know, FOIA provides that if only a portion of a

record is exempt from release, all reasonably segregable portions shall be provided. Thus, if EPA asserts that a portion of a record that we have requested is exempt, please provide us with a copy of the remainder of the record. If EPA asserts that the exempt portions cannot reasonably be redacted, please state in detail the reasons for that assertion.

Please provide the requested material at the earliest possible date, and, in any event, please provide as complete a response as possible to this request within the twenty (20) day period prescribed by FOIA. Please forward currently available records as soon as possible and others as they become available.

### ***Fee Waiver Request***

AFBF hereby asks EPA to waive all fees associated with this request. As required for a FOIA fee waiver, under 5 U.S.C. § 552(a)(4)(A)(iii), disclosure of the information requested (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of EPA, as an agency of the federal government, and (2) is not primarily in the commercial interest of AFBF or its members. Congress has directed that fee waivers be "liberally construed in favor of noncommercial requesters." See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting , 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)). See also *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C.Cir.2003) (same), *NRDC v. EPA*, 581 F. Supp. 2d 491, 497 (S.D.N.Y. 2008) (same). AFBF is a noncommercial requester. AFBF is a *not-for-profit organization* organized as an "agricultural organization" under § 501(c)(5) of the IRS Code. AFBF's mission is to be the unified national voice of agriculture, working along with our 50 member Farm Bureau organizations in all states plus Puerto Rico to strengthen and improve American agriculture and to build strong, prosperous rural communities.<sup>1</sup> AFBF is an independent, non-governmental, voluntary organization governed by and representing American farmers and ranchers united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and technological improvement and, thereby, to promote an efficient, productive, and strong agricultural community.

To achieve its mission, AFBF utilizes two key strategies: public policy advocacy and public communications. AFBF regularly advocates on behalf of farmers and ranchers before Congress, federal agencies and federal courts. AFBF also regularly provides information about government activities affecting agriculture to the farm and ranch community, Congress and members of the general public. Both the farm and ranch community and the general public have a strong interest in understanding how EPA determines who is granted a fee waiver request under FOIA and why. AFBF intends to

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<sup>1</sup> For more information about AFBF, please see the organization's website at [www.fb.org](http://www.fb.org).



utilize the information disclosed by EPA in response to this FOIA request for purposes of both advocacy and public communication and dissemination.

As described further below, this request meets the six factors that EPA uses to review fee waiver requests, at 40 C.F.R. § 2.107(l).

1. ***The subject of the request.*** The subject of our request concerns the direct and “identifiable operations and activities” (40 C.F.R. § 2.107(1)(2)(i)) of the EPA, and specifically seeks to disclose how EPA handles and responds to FOIA fee waiver requests from the various entities that request information from EPA.
2. ***The informative value of the information to be disclosed.*** EPA’s disclosure of the records requested will improve AFBF’s and the public’s understanding of government operations or activities because the disclosure will enable AFBF and the public to understand how EPA implements its authority and obligations under FOIA with regard to fee waiver requests. The costs associated with responding to FOIA requests can be extensive, and how EPA determines who will bear these costs is of great interest to AFBF and the public. The information requested is substantive, not administrative in nature, and is not readily available from any other source but EPA. The records requested would be meaningfully informative and “likely to contribute” to an increased public understanding of how EPA responds to fee waiver requests from various entities. (40 C.F.R. § 2.107(1)(2)(ii)).
3. ***The contribution to an understanding of the subject by the public is likely to result from disclosure.*** As described above in Factor 2, AFBF’s analysis and public dissemination of the requested information will greatly contribute to the public’s understanding of how EPA implements federal regulations and FOIA in response to fee waiver requests. As a national not-for-profit organization interested in government operations and activities affecting farmers and ranchers, AFBF has a particular interest in whether EPA is complying with its own regulations in determining whether a person or entity requesting public records is granted a fee waiver request. AFBF has a strong interest in enforcing compliance with FOIA and has filed lawsuits protecting that interest and the interests of its members. AFBF has also made FOIA requests of its own and has been denied what we believe to be valid fee waiver requests. Moreover, it is widely known that many share AFBF’s concerns that EPA’s fee waiver determinations favor certain types of organizations – such as environmental advocacy organizations and disfavor similar fee waiver requests from not-for-profit organizations advocating on behalf of regulated entities.<sup>2</sup> Indeed, the subject of this records request is of sufficient interest to the public that the Office of

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<sup>2</sup> For recent articles on the subject, see, e.g., *EPA Playing Politics with FOIA Fee Waivers*, U.S. SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS: MINORITY BLOG (May 20, 2013), [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord\\_id=c27df7a8-05c9-6f77-6358-176a2c04e854](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=c27df7a8-05c9-6f77-6358-176a2c04e854); Eric Martinson, *EPA: Numbers Disprove Conservative Claim of Bias*, POLITICO (June 10, 2013), <http://www.politico.com/story/2013/06/epa-numbers-disprove-conservative-claim-of-bias-92460.html>.

Inspector General, pursuant to a request by the Acting Administrator, has begun a review of EPA's fee waiver process, including whether EPA adheres to and demonstrates timely and unbiased treatment of fee waiver requests.<sup>3</sup> The information requested by AFBF herein will aid the public in understanding that controversy and clarify whether, based on the contents of the disclosure, any potential bias could be confirmed.

Moreover, AFBF "has the ability and intention to convey this information to the public," 40 C.F.R. § 2.107(1)(2)(iii), and will use its extensive news media coverage to broadly inform the public of information found in EPA's response. AFBF can accomplish this public information and dissemination by any of the following:

- Publication of a bi-monthly electronic newsletter "FBNews" with a circulation of 15,000 people.
- Daily electronic distribution of "Executive Newswatch" which reports on news issues of interest to agriculture. The electronic distribution is to all 50 member Farm Bureaus, which in turn further distribute the information in their discretion.
- Bi-weekly reporting through a radio "Newslane" on current issues of interest to agriculture. This recorded Newslane is distributed nationwide through the national association of farm broadcasting, reaching up to 180,000 member stations nationwide.
- Weekly issue columns called "Focus on Ag" distributed to over 500 media outlets nationwide.
- Web based portals and social media, including AFBF's website at [www.fb.org](http://www.fb.org) (672,559 visits from January 1, 2013 to June 30, 2013) Facebook (over 15,000 followers) and twitter.

AFBF also intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF by posting them on its public website, at [www.fb.org](http://www.fb.org), within two months of receipt.

4. ***The significance of the contribution to public understanding.*** Disclosure of the requested information is likely to contribute "significantly" to public understanding of EPA's operations or activities because, as explained above, the information already available on the subject of this request does not clearly establish how EPA implements its FOIA authority and regulations. Indeed, EPA's FOIA determinations regarding fee waiver requests are made outside of the public eye, known generally only to the requestor and EPA. Thus, disclosure of the information requested will

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<sup>3</sup> See [http://www.epa.gov/oig/reports/notificationMemos/newStarts\\_06-19-13\\_FOIA\\_Fee\\_Waiver\\_Process.pdf](http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf).



inform AFBF and its members, lawmakers, and the general public about how EPA reviews and responds to fee waiver requests by various entities under FOIA. Knowledge of how EPA responds to fee waiver requests by various entities will enlighten the public's understanding of the availability of public records from EPA and facilitate the public's access to those records under FOIA. Moreover, EPA's response to this request will provide actual documentation of how EPA makes fee waiver determinations in practice, thus significantly assisting AFBF and public understanding of whether there is any bias in EPA's granting or denying fee waiver requests or whether EPA is indeed following applicable guidance and regulations.

Although EPA has published guidance on submission of fee requests under FOIA, it has not provided access to the actual requests and responses it receives and much uncertainty exists as to how EPA treats fee waiver requests from different not-for-profit organizations. Disclosure of the requested information will greatly enhance the understanding of the subject among AFBF, its members, and other members of the public throughout the country that are interested in the subject.

5. ***The existence and magnitude of a commercial interest.*** As a not-for-profit organization, AFBF has no commercial, trade or profit interest that would be furthered by the requested information. AFBF's sole interest in the substantive information requested is to understand EPA's operations, educate its members, lawmakers and the general public as to how EPA grants and denies fee waiver requests, and disseminate the responsive documents to the public. EPA ordinarily presumes the public interest will be the interest primarily served by disclosure to a news media requester. As described further below, one of AFBF's primary reasons for requesting this information is to disclose it to its members, lawmakers and the general public who are interested in how EPA responds to FOIA fee waiver requests, and not to advance any commercial interest.
6. ***The primary interest is in disclosure.*** AFBF does not have a commercial interest in disclosure, any more than a private citizen seeking the same information about government. Moreover, AFBF is similar to other not-for-profit organizations that engage in public policy advocacy. AFBF regularly engages in informational, legislative and litigation campaigns designed to influence public policy consistent with AFBF's mission—to enhance and strengthen the lives of rural Americans and America's agricultural communities. Such public policy campaigns do not amount to furthering a direct interest in commerce, trade or profit regardless of whether the focus of the policy campaign is to the benefit of entities regulated by EPA.

A fee waiver is justified because disclosure of the requested information is clearly in the public interest and AFBF has no potential commercial interest in disclosure.

#### **AFBF Is a Media Reporter**

If AFBF's above fee waiver request is denied, AFBF seeks a fee waiver under the media exemption. AFBF serves the function of a media reporter and thus qualifies as a

"representative of the news media or news media requestor". 40 C.F.R. § 2.107(b)(6). AFBF's communications department regularly collects, analyzes and disseminates news of current events and current interest to its members and the general public:

1. Publication of a bi-monthly electronic newsletter "FBNews" with a circulation of 15,000 people.
2. Daily electronic distribution of "Executive Newswatch" which reports on news issues of interest to agriculture. The electronic distribution is to all 50 member Farm Bureaus, which in turn further distribute the information in their discretion.
3. Bi-weekly reporting through a radio "Newsline" on current issues of interest to agriculture. This recorded Newsline is distributed nationwide through the national association of farm broadcasting, reaching up to 180,000 member stations nationwide.
4. Weekly issue columns called "Focus on Ag" distributed to over 500 media outlets nationwide.
5. Web based portals and social media, including AFBF's website at [www.fb.org](http://www.fb.org) (672,559 visits from January 1, 2013 to June 30, 2013), Facebook (over 15,000 followers) and twitter.

Accordingly, AFBF also is entitled to a waiver of fees as a news media reporter.

If this fee waiver is denied, however, we are prepared to pay the proper fees for the direct costs of record searches, review and duplication. If your office estimates that costs will exceed \$1000, please call me before complying with this request to obtain my agreement to pay the fees. Please contact me directly at (202) 406-3616 or via e-mail at [ellens@fb.org](mailto:ellens@fb.org) if you have any questions concerning this request. I look forward to your prompt response.

Sincerely,



Ellen Steen  
AFBF General Counsel